Recent Developments of the Banking Secrecy in Switzerland

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Introduction

The following article shall give its readers a short overview over two legal issues regarding the situation of the banking secrecy ("*Bankgeheimnis*") in Switzerland. Firstly, the currently proposed changes of the Swiss Anti-Money Laundering Act ("**SAMLA**") will be described. They will be relevant in connection with the discussion of the banking secrecy, as their entry into force would not only strengthen the fight against money laundering and terrorist financing. At the same time, it would pierce through the banking secrecy, at least on the level of the so called Financial Intelligence Units ("**FIUs**"). Secondly, the Federal Administrative Court ("**FAC**") has recently issued a decision with respect to the administrative assistance to the Internal Revenue Service ("**IRS**") of the United States. In said decision, the FAC basically states that the requests for administrative assistance are not sufficient as the wording of the "search criteria" in the request of the IRS also includes people who at the utmost could be suspected of having committed a tax evasion ("*Steuerhinterziehung*"), but not a tax fraud ("*Steuerbetrug*").

These two developments will anchor the following article. At the same time, the Swiss government is trying to reach an agreement with respect to tax accords with Germany and the United Kingdom. However, the state of the negotiations with respect to these countries remains ambiguous. On one side, even though Switzerland and the United Kingdom have signed a tax accord in autumn 2011, which should enter into force in the beginning of 2013, the United Kingdom has recently asked Switzerland for a renegotiation of said accord. On the other side, Switzerland and Germany signed a tax accord in September 2011. As this accord encountered a strong opposition in Germany, both parties have recently met for new talks. In any case, before the amended treaty can enter into force, the parliaments of both countries have to agree thereto.

Proposed Changes of the Swiss Anti-Money Laundering Act

The first of the two recent developments in connection with the Swiss banking secrecy have been the changes proposed by the Federal Council in connection to the SAMLA. On 18 January 2012, the Federal Council approved the preliminary draft of an amendment of the SAMLA and initiated the consultation procedure ("*Vernehmlassungsverfahren*") which ends on 27 April 2012.

The relevant background with regard to the proposed SAMLA-amendments presents itself as follows: The Money Laundering Reporting Office Switzerland ("**MROS**") is an institutional pillar of the legal framework with respect to money laundering. It receives reports of suspicious activity on money laundering and its precursor offences. The analysis of such reports often requires the MROS to exchange information with FIUs abroad. The current legal situation however, does not permit the exchange of financial information such as bank account numbers or money transactions with its foreign counterparts in the context of mutual

legal assistance. It is the Federal Council's goal to enable the MROS to exchange all available information and thus to end the hindrance of mutual legal assistance through bank client confidentiality.

These proposed changes mount back to the Egmont Group's declaration of July 2011 that the FIUs are explicitly bound to exchange all available information and may no longer be hindered to do so by national secrecy laws. Thus, the MROS's practice was seen as a breach of the principles of the Egmont Group. Currently, the MROS is the only FIU out of the 127 members of the Egmont Group that is obliged to withhold information on account of national secrecy laws.

In view of these facts, the Federal Council considers it appropriate to partially revise the SAMLA and to essentially empower the MROS to transmit data such as bank account numbers to the FIUs outside of Switzerland. The planned amendments shall also allow the MROS to request information from financial intermediaries who do not submit their own suspicious activity report pursuant to art. 9 SAMLA. This will firstly improve the quality of information the MROS transmit to the foreign FIUs and secondly aid the MROS's own analysis of the suspicious activity reports.

The Decision of the Federal Administrative Court in the case of a Crédit Suisse Client v. the Swiss Federal Tax Administration

On 5 April 5 2012, the Federal Administrative Court ("**FAC**") affirmed the appeal of a client of Credit Suisse. The client wanted to prevent the disclosure of his bank account data to the IRS of the United States.

The background of this case was a request from the IRS for administrative assistance in which it accused Crédit Suisse ("**CS**"), that their employees actively assisted clients of theirs, which are subject to US tax law, to conceal their income and assets from the United States tax authorities. The request was based on the Convention between the United States and Switzerland for the Avoidance of Double Taxation with Respect to Taxes and Income of 2 October 1996 ("**DTC USA-Switzerland 1996**").

The FAC held that the "search criteria" that were described in the request for administrative assistance were formulated in too broad terms. In such a case, administrative assistance cannot be granted according to the DTC USA-Switzerland 1996. Pursuant to the FAC, this would be inconsistent with the principle of proportionality. The verdict is final and cannot be referred to the Federal Supreme Court.

The verdict refers to a request of the IRS from September 2011. In said request, the IRS had asked for administrative assistance and had accused CS of actively assisting their clients, subject to US tax law them respectively, to conceal their income and assets from the United States tax authorities. The request did not indicate the names of the bank clients. It only described the mentioned conduct of the employees of CS. Also, it contained four categories of identification criteria, through which the bank could determine the clients concerned by the request.

The FAC concludes that the wording of the "search criteria" in the request of the IRS for administrative assistance includes people who at the utmost could be suspected of having committed tax evasion, but not tax fraud. Additionally, the Swiss Federal Tax Administration ("**SFTA**") examines only *ex post* whether there is fraudulent intent. Such element is necessary for the existence of fraudulent conduct triggering administrative assistance. Thus, the FAC deduces that the "search criteria" are not sufficiently tailored to enable the bank to identify those clients with a high degree of probability, who are suspected of a fraudulent conduct triggering administrative assistance. The criteria do not simply leave the task of examining whether the transmitted data are suitable to confirm the suspicion of a fraudulent conduct, to the SFTA. Such a procedure is seen as inconsistent with the principle of proportionality by the FAC, which also applies to proceedings of administrative assistance as a general principle of administrative law.

Furthermore, the FAC reaffirms its jurisdiction that under the DTC USA-Switzerland 1996 no administrative assistance shall be granted for presumed tax evasion, even if high amounts are at stake. It also confirms that the mere failure to declare a bank account may be qualified as a tax evasion at the utmost, and as such is not subject to administrative assistance.

In the Swiss media, different opinions with regard to the mentioned judgement have been issued. On one side, the Secretary of the State for International Tax Questions does not see a danger for the on-going negotiations with the United States with regard to a potential final and global solution for CS as well as for ten other Swiss banks that have allegedly helped tax evaders from the United States. On the other side, several politicians agree that the decision will make these negotiations with the United States more difficult.

In any case, it has to be noted that the consequences of the FAC's decision seem to remain limited as it refers to the old tax treaty, the DTC USA-Switzerland 1996, which only foresees administrative assistance in cases of tax fraud, but not of tax evasion. The court indicated that it would judge otherwise with respect to administrative assistance for tax evasion, once the new tax treaty with the United States enters into force.

Conclusion

The current developments with regard to the Swiss banking secrecy remain one of the hottest topics in Switzerland from a political as well as from a legal point of view. The proposed changes of the SAMLA and the FAC's recent decision regarding the administrative assistance case concerning CS only highlight a string of numerous complex and each other simultaneously overlapping developments, whose final destination remains open at the moment.